In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1077

GERSON NAGELBERG AND VIVIENNE NAGELBERG,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is not yet reported (Pet. App. 1a–5a).

JURISDICTION

The judgment of the court of appeals was entered on November 9, 1970. The petition for a writ of certiorari was filed on December 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, there was an unlawful use of a suppressed statement.

2. Whether inadvertent references to Gerson Nagelberg by a witness were prejudicial in light of the judge's instructions.

3. Whether Gerson Nagelberg's motion for severance was properly denied.

4. Whether the court properly refused to restrain the government from cross-examining Gerson Nagelberg as to his prior narcotics convictions if he chose to testify.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring to import narcotics into the United States from Canada and of buying narcotics, in violation of 21 U.S.C. 173 and 174. Petitioners were sentenced to concurrent prison terms, of which the longest was fifteen years, and were each fined $15,000. The court of appeals affirmed (Pet. App. 1a–5a).

At trial, it was established by the testimony of Roger Mourant, a Canadian policeman, that he and another Canadian policeman, Kwasowsky, had smuggled one ounce of heroin from Canada into the United States and sold it to Vivienne Negelberg. (Tr. 129–135).[1] On another occasion, Mourant came to the United States alone and sold five and one-half pounds of heroin to both petitioners (Tr. 164–170). Mourant

[1] "Tr." refers to the trial transcript lodged in three volumes with this Court.

also testified that he, Kwasowsky, and petitioners had discussed plans for bringing additional quantities of narcotics into the United States (Tr. 139, 142, 144–146, 153–154).

Vivienne Nagelberg, in her own defense, testified that neither she nor Gerson Nagelberg, her husband, had ever purchased narcotics from the Canadian policemen or made any arrangements with them to smuggle narcotics into the United States (Tr. 573–575). She also claimed that she and her husband had worked as informants for the Federal Bureau of Narcotics (Tr. 551–558), and that her relationship with Mourant and Kwasowsky arose in Montreal, where she was following a federal agent's instructions (Tr. 566–570). She testified that she was supposed to meet Claude Benichou, with whom she had previous contacts, at a Montreal airport together with two French narcotics couriers (Tr. 567–569). However, Canadian authorities at the airport had arrested the two French couriers, became suspicious of her, and detained and questioned her (Tr. 23–27, 47–48, 53), as a result of which she never met Benichou (Tr. 570). She became acquainted with Mourant and Kwasowsky, she said, when she was released and they were ordered to escort her to the United States border for deportation (Tr. 558–560, 569–570).

The questioning by Canadian authorities was done, in part, at the suggestion of a federal narcotics agent, who was present during most of the questioning and when Mrs. Nagelberg's statement was taken. In response to the questioning, Mrs. Nagelberg said that

she would cooperate with the Canadian authorities in obtaining evidence against Benichou (Tr. 54–57). In her written statement (R. No. 48, Exh. K, Defendant's Affidavit in Support of Motion for Bail),[2] she said that she had met with Benichou in December 1966 at a friend's apartment in New York, and that in March 1967 she called Benichou from the Chateau Champlain in Montreal but was unable to reach him. The warnings required by *Miranda* v. *Arizona*, 384 U.S. 436, for custodial questioning occurring in the United States were not given at the time of this questioning (Transcript of June 12, 1970, 493–496),[3] and accordingly the written statement was suppressed by the trial court (Tr. 517).

Subsequent questioning on cross-examination of Mrs. Nagelberg referred to two meetings with Benichou. In response, she admitted her connection with him, but denied purchasing narcotics from him in December 1966 and denied that he came to her Chateau Champlain hotel room in March 1967 (Tr. 595–599).

Benichou was called in rebuttal, and testified that in December 1966 he delivered two pounds of heroin to Vivienne Nagelberg at her New York apartment (Tr. 603–604) and that in March 1967 he met her in the Chateau Champlain Hotel in Montreal, where he opened a suitcase full of narcotics in her presence

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[2] "R." refers to the certified record of the proceedings below.

[3] This transcript was omitted from the certified record by the clerk of the court of appeals and we have lodged it with the Clerk.

(Tr. 605-606). Although he had been instructed by the Assistant United States Attorney to make no reference to Gerson Nagelberg in his testimony (Tr. 602), Benichou said that "Jerry" (Gerson Nagelberg) was present on these occasions (Tr. 603, 607). The court instructed the jury that Benichou's testimony was admitted only to impeach the credibility of Mrs. Nagelberg and that any reference to Gerson Nagelberg was to be completely disregarded (Tr. 653-655).

ARGUMENT

1. Vivienne Nagelberg contends that Benichou's rebuttal testimony was the fruit of her suppressed statement to the Canadian authorities.[4] Since this objection was first raised only after Benichou had testified on direct and cross-examination (Tr. 642-643), the source of the government's information about Benichou was not fully explored.[5] Nevertheless, the record clearly shows that he was known to Canadian authorities as a trafficker in narcotics before Mrs. Nagelberg was arrested (D.A. 19a).[6] Constable Mourant testified that she had told him and Constable Kwasowsky, at their first meeting in Montreal, that Benichou had delivered

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[4] The court of appeals' suggestion that the district court erred in suppressing the statement (Pet. App. 4a, n. 1) is *dictum*; the statement was in fact suppressed.

[5] In answering post-trial motions by the defense, the government argued that it could be inferred that Mrs. Nagelberg had mentioned Benichou after her initial arrest in non-custodial interviews with a United States agent. It offered to establish such facts at a hearing, but the defense declined the invitation.

[6] "D.A." refers to Defendant's Appendix in the court of appeals, a copy of which we have lodged with the Clerk.

herein to her (R. 303). Since a prior source of knowledge about Benichou's existence and involvement thus appears, it is unnecessary to reach the question whether the mere fact that the name of a potential witness was obtained from his being mentioned in a suppressed statement would justify exclusion of any testimony by that witness. It may be noted, however, that the courts have ruled to the contrary. *Smith* v. *United States*, 324 F. 2d 879 (C.A.D.C.), certiorari denied, 377 U.S. 954.

Mrs. Nagelberg testified to her acquaintance with Benichou, and was cross-examined about it, after her statement had been suppressed. Once she had admitted the relationship, but denied that she had purchased narcotics from Benichou in December 1966 or seen him in Montreal in March 1967,[*] Benichou's testimony was proper as impeachment. *Harrison* v. *United States*, 392 U.S. 219, 223, and n. 9). See *Spencer* v. *Texas*, 385 U.S. 554; *Walder* v. *United States*, 347 U.S. 62.

2. Benichou's references to "Jerry" were inadvertently made, after he had been instructed not to mention the husband. The trial court's instructions (Tr. 653–655) were adequate to cure any possible misuse of those references by the jury.

Moreover, as the court below noted, the instructions to disregard the references were more favorable than required. Mrs. Nagelberg testified on direct that she and her husband had worked as informants for sev-

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[*] This cross-examination did not refer to or reflect her suppressed statement, which referred neither to a purchase of drugs in December 1966 nor to an actual meeting in March 1967.

eral years. Thus, it was proper to show, as to both, activities which were not consistent with their alleged role as informants.[8]

3. Gerson Nagelberg attempts to use the references to him in Benichou's testimony as a basis for the argument that it was error to deny his motion for a severance. As shown above, those references would in fact have been properly admissible against him, but were adequately withdrawn from the jury's consideration. Petitioners, who acted together, were properly tried together. Whatever basis for severance might have existed on the basis of a claim that Mrs. Nagelberg's statement would implicate her husband disappeared when the statement was suppressed.

4. Mr. Nagelberg's request that the court preclude cross-examination as to his prior narcotics convictions if he took the stand was properly denied. The district judge indicated that he favored the rule set forth in *Luck* v. *United States*, 348 F. 2d 763 (C.A.D.C.), but that, since counsel indicated that Mr. Nagelberg would testify that his narcotics activity was as a government agent, proof of prior convictions would be relevant as specifically impeaching his credibility on this point

[8] Since Benichou's testimony was not admitted against Mr. Nagelberg, he was not deprived of any right of confrontation. It may be noted that counsel for Mr. Nagelberg asked the court if he could conduct a general cross-examination of Benichou even though the witness had not specifically referred to Gerson Nagelberg (Tr. 627). The court agreed but warned counsel that he would be responsible for anything Benichou said (Tr. 627). Thus, even though counsel chose later not to cross-examine (Tr. 647–650), it is clear that he had the opportunity to do so.

(D.A. 14a–15a). This ruling was clearly justified. *Spencer* v. *Texas*, 385 U.S. 554, 561.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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